Petition

81-1058

No. 81-

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

WILLIAM J. MORTER,
Petitioner-Appellant,

VS.

UNITED STATES OF AMERICA,
Respondent-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a conflict among the circuits about which standard to apply in determining whether to suppress the fruits of a search which has violated some aspect of the Federal Rules of Criminal Procedure 41 present an important issue of federal law?

2. Assuming the Ninth Circuit applied the correct standard for determining whether suppression was appropriate, did it misapply its own test by holding that the failure to present a federal magistrate with a sworn affidavit constituted only technical, nonfundamental error, not worthy of suppression?

3. If the correct standard is the one applied by the Second and Eighth Circuits, does Rule 41(c)'s oath requirement insure reasonableness on the part of federal officers and protect the integrity of the Federal Courts?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, *United States v. Morter,* Case No. 80-1764 (hereinafter referred to as *"Opinion"*), appears as Appendix "A" to this petition.

JURISDICTION

The petitioner, William Morter (hereinafter "Petitioner"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, which was entered in this proceeding on October 9, 1981

This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Rule 41 of the Federal Rules of Criminal Procedure, in relevant part:

> (c) Issuance and Contents.
>
> (1) Warrant upon affidavit.
>
> A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only upon an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant.

STATEMENT OF THE CASE

A. Proceedings to Date

Petitioner was indicted for a violation of 21 U.S.C. § 841(a)(1), knowingly and intentionally possessing with intent to distribute approximately 1,680 grams of cocaine, a Schedule II narcotic drug controlled substance. (CR 2). The indictment was filed July 25, 1980, and alleged the criminal conduct occurred on July 18, 1980.

On August 25, 1980, Petitioner moved to quash search warrants and to suppress evidence obtained as a result of execution thereof. (CR 18). On September 5, 1980, an evidentiary hearing on the Motion to Suppress was held. (CR 39; RT 1-323).

It came to light in the evidentiary hearing that neither the executed original affidavit, nor an executed copy, in support of the search warrant of Petitioner's motel room could be produced at the hearing. (RT 19-44). Petitioner's Motion to Suppress the fruits of the search of the motel room on this basis was denied after evidence was taken on this issue. (*Id.* and CR 39 and 40).

A jury trial ensued which lasted from September 9 through 12, 1980. The evidence against Petitioner consisted of alleged cocaine and narcotics preparation paraphernalia that were seized pursuant to a search warrant for a motel room and for a Mercury automobile. Without the evidence found under the motel room warrant, there would have been insufficient evidence upon which to convict Petitioner.

The jury commenced deliberations on September 11, 1980. On September 12, 1980, the jury returned a verdict of guilty as to Petitioner. (RT 814).

On appeal to the Court of Appeals for the Ninth Circuit, Petitioner challenged, *inter alia*, the denial of his Motion to Suppress. On October 9, 1981, the Ninth Circuit, by Memorandum Decision, affirmed the decision of the District Court in denying Petitioner's Motion to Suppress. (Appendix A).

B. Statement of the Facts

1. Factual Background

Petitioner and one Manuel Perez were under surveillance for at least three (3) days between July 16 and 18, 1980. Perez arranged for the delivery of certain items of rattan furniture from Peru to a storage facility in South Gate, California. (RT 351-396). Thereafter, he picked Petitioner up at Los Angeles International Airport and took him to a motel where the searches ultimately took place. (RT 372; 402).

The two drove separate cars to the storage facility where the furniture had been delivered. (RT 403). Petitioner left the area of the storage facility without going in. (RT 404). Perez went in, was photographed by the F.B.I., took some furniture and went back to the motel to which Petitioner had already returned. *Id.* Perez thereafter left the motel. *Id.*

Petitioner was later seen to bring an attache case into the motel from his car. (RT 406). Four (4) hours later, Perez was seen to return to the motel and carry in a paper bag, and then leave, only to return and leave again. (RT 406-407).

In the early morning hours of July 18, 1980, a search warrant was executed in Petitioner's motel room. (RT 435). Seized was an attache case containing suspected cocaine and a shoulder bag containing a mortar and pestle, calculator, strainer, plastic spoon, empty bottle of inositol, Ziploc plastic bags, a Pyrex dish, and a quantity of suspected cocaine. (RT 435-439; 606-608). Seized from Peti-

tioner's car pursuant to another search warrant were a triple beam balance scale and a plastic scoop. No cocaine was found in the car.

Petitioner was charged only with the alleged cocaine in the attache case in the motel room. The cocaine in the overnight bag was not admitted into evidence.

2. Motion to Suppress

The defense had requested production of the original affidavits that were offered in support of the five (5) search warrants issued in the case. (RT 19). No original had been found for the warrant authorizing the search of Petitioner's motel room. (RT 20). The Court made an order at the hearing to have the original produced for the hearing. *Id.* The counsel for the Petitioner told the Court that he had searched in every conceivable possible location for the original affidavit but could not find it. (RT 25). Because only an unsigned copy of the affidavit could be found to offer in support of the warrant of the motel room (RT 22), the Court agreed to hear testimony on the issue of whether the warrant was validly issued. (RT 26). Petitioner argued that testimony alone could not cure this defect, but the Court permitted the affiant to testify nevertheless. *Id.*

Special Agent Lane M. De Silva of the F.B.I. testified that he personally applied before the Magistrate for the five (5) search warrants issued in the case. (RT 28). De Silva indicated that he was sworn on each warrant and signed each of the five (5) affidavits (RT 29-30), although this latter assertion was received over Petitioner's Best Evidence objection. (RT 30:14-17).

Further cross-examination of De Silva developed that the original affidavit was in each of the four other search warrant files. (RT 36 and 42). Petitioner moved that all evidence seized under the warrant without the signed original affidavit be suppressed. (RT 44). This was denied, as well as Petitioner's request to brief the issue. (RT 44).

On appeal, the Ninth Circuit found that the government's failure to present the magistrate with a sworn affidavit constituted only "technical" error, since Agent De Silva had signed four other identical affidavits for four other search warrants. The Ninth Circuit therefore affirmed the lower court's denial of Petitioner's Motion to Suppress, reasoning that ". . . the magistrate had before him sufficient sworn testimony [for *other* warrants] of the F.B.I. agent to support the issuance of the warrant." Therefore, the failure to swear the agent in for support of the warrant for the motel was merely a "technical" omission.

ARGUMENT

I

THIS CASE PRESENTS A CRUCIAL ISSUE OF FEDERAL LAW, SINCE TWO DIFFERENT TESTS, YIELDING INCONSISTENT RESULTS, ARE USED TO DETERMINE THE CONSEQUENCES OF A VIOLATION OF FEDERAL RULE OF CRIMINAL PROCEDURE 41

In its Memorandum Opinion in this case, the Ninth Circuit held that:

> Only fundamental violations of Federal Rule of Criminal Procedure 41 require suppression of evidence obtained under the warrant. *United States v.*

> *Vasser*, 648 F.2d 507, 510 (9th Cir. 1980). The violation here was only technical.

Opinion, p. 1.

As will be addressed below in more detail, there are two substantially different standards used to determine whether evidence seized in a search which violates some provision of Rule 41 should be suppressed. The Ninth Circuit, by so phrasing its conclusion, demonstrated its continued adherence to one of these tests. The fact that two different tests are used presents a crucial issue of federal law. The same Rule 41 violation which would lead to suppression of the fruits of a search in one circuit could lead to a denial of suppression in another.

The Ninth Circuit follows the Second Circuit by applying a "fundamental/nonfundamental" test to violations of Rule 41. Relying on *United States v. Burke*, 517 F.2d 377 (2d Cir. 1975), the Ninth Circuit held in *Vasser, supra*, that "fundamental" violations of Rule 41 require automatic suppression, while "nonfundamental" violations require suppression only if the defendant can demonstrate that he or she was "prejudiced" by the violation. Under this test, a violation is "fundamental" if it renders the search unconstitutional under traditional Fourth Amendment standards. Thus, in *Vasser*, the court held that a federal agent, who tape recorded his affidavit and then later swore to the truth of its contents, violated the letter of Rule 41, but that such a "timing" violation was "nonfundamental".

At least two other circuits apply a different test to determine whether the fruits of a search which violates Rule 41 should be suppressed. This test, enunciated most clearly in *United States v. Sellers*, 483 F.2d 37 (5th Cir. 1973), dis-

tinguishes between a Rule 41 provision "designed to assure reasonableness on the part of federal officers", and a provision that "merely blueprints the procedure for issuance of federal warrants." 483 F.2d at 44.

Likewise, the Eighth Circuit in *United States v. Sturgeon*, 501 F.2d 1270 (8th Cir. 1974), articulated essentially the same test in a slightly different way. There, the defendant moved to suppress the fruits of the search for various Rule 41 violations. In laying out the standard which would govern its inquiry, the court wrote:

> We must decide whether . . . any provision of Rule 41 designed to protect the integrity of the federal courts or govern the conduct of federal officers was violated.

501 F.2d at 1272.

Applied to the same set of facts, the "reasonableness/blueprint" test used by the Fifth and Eighth Circuits could render a different result than the "fundamental/nonfundamental" test used by the Second and Ninth Circuits. The key question in the Second and Ninth Circuits is whether the violation made the search unconstitutional, while the key question in the Fifth and Eighth Circuits is whether the violated provision of Rule 41 was one which is meant to assure reasonableness of officers or protect the integrity of the courts. Obviously, a court could find that a clause in Rule 41 was designed to assure reasonableness, although that clause is not mandated by the Constitution.[1]

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[1]For instance, Federal Rule of Criminal Practice 41(c)2(d) requires that, when applying for a warrant over a telephone, the testimony of the caller must be recorded by either a voice recording device or a stenographer. Suppose an agent, having sufficient evi-

Moreover, each test demands a different kind of analysis, which will lead to inconsistent results among the circuits. The "fundamental/nonfundamental" test of the Second and Ninth Circuits examines the specific facts before it. In each case, the court inquires whether a particular defendant's constitutional rights were violated. Thus, depending on the surrounding circumstances, a court might hold that the violation of a certain Rule 41 provision is "fundamental" in one case but "nonfundamental" in another. For instance, according to the Ninth Circuit in the instant case, a failure to comply with the oath requirement of Rule 41(c)1 constituted only "technical" error, while a transgression of the same clause in a case with different facts might well constitute "fundamental" error.

The reasonableness/blueprint test, in comparison, does not examine the specific consequences or effects of the violation; rather, it is concerned with whether the rule violated was meant to protect the integrity of the court system or to assure reasonableness on the part of federal officers. If so, the Eighth and Fifth Circuits will suppress the fruits of every search in violation of that rule, regardless of the specific facts of a particular case, in order to foster a judicially efficient and fair procedure for reviewing the validity of warrants. These circuits do this to preclude a system which would encourage agents to lie

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dence for probable cause, fails to insure that his telephone call is recorded. In that case, the Second and Ninth Circuits could hold that the defendant's constitutional rights have not been violated, while the Eighth and Fifth Circuits could well hold that 41(c)2(d) was designed to protect the integrity of the courts and to assure reasonableness on the part of federal officers. Totally different decisions on the question of suppression would follow.

about what happened procedurally. Because the Fifth and Eighth Circuits react consistently from case to case to a violation of a certain Rule 41 provision, while the Second and Ninth Circuits rule on a case-by-case basis, and because of the differences in the tests applied, the result in a Rule 41 suppression hearing will depend on which circuit is hearing the case.

In the following section, Petitioner argues that the Ninth Circuit misapplied its own test. However, in the event that the Supreme Court should decide that the Ninth Circuit correctly applied the "fundamental/nonfundamental" test, then this case squarely presents the conflict among the circuits, since there is little doubt but that a court using the "reasonableness/blueprint" test would suppress the fruits of the motel search in this case (See Part II(B) of this Petition). In any event, this case offers the Supreme Court the opportunity to review the conflict and lay out the correct method of analysis in this area.

II

THE NINTH CIRCUIT ERRED IN UPHOLDING THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION TO SUPPRESS SINCE UNDER EITHER TEST THE FRUITS OF THE SEARCH SHOULD HAVE BEEN EXCLUDED

A. The Government's Failure to Present the Magistrate With a Sworn Affidavit Was a Fundamental Violation of Rule 41

It is important for the purposes of this Petition to understand fully the implications of the Ninth Circuit's holding in this case. The court held that the government's

failure to present the magistrate with a sworn affidavit to support the search warrant for the motel room constituted only "technical" or nonfundamental error. According to its own fundamental/nonfundamental test as outlined in *Vasser, supra,* this conclusion can stand only if the government's error is of no constitutional significance. Therefore, the Ninth Circuit's holding, phrased differently, states that *it is constitutionally permissible for the government not to reveal to the magistrate all the places it intends to search on the strength of one affidavit.*

There is obvious potential for governmental abuse inherent in this astounding opinion. For this reason alone, the Ninth Circuit should be reversed. However, another serious reason also necessitates reversal: because a search warrant issued without a sworn statement clearly infringes on a defendant's Fourth Amendment rights, the Ninth Circuit misapplied its own test by concluding that the government's error was "nonfundamental."

The oath requirement of Rule 41 implements the Fourth Amendment "Oath or Affirmation" clause. The Fourth Amendment states that search warrants can issue "upon probable cause supported by Oath or Affirmation." This requirement constitutes one of the fundamental protections afforded United States citizens against governmental intrusion in their lives, and as such, this requirement "should be construed to prevent impairment of the protection extended." *Grau v. United States*, 287 U.S. 124, 128 (1932). It has been held "again and again that the prohibition of the Fourth Amendment against unreasonable searches and seizures must be rigidly enforced and the procedure for

issuance of a search warrant must be scrupulously adhered to." *Baysden v. United States*, 271 F.2d 325, 327 (4th Cir. 1959).

In *Frazier v. Roberts*, 441 F.2d 1224 (8th Cir. 1971), a search warrant was concededly deficient because, *inter alia*, it was based on partially unsworn oral information. The court suppressed the fruits of the search, since the defendant's Fourth Amendment rights were violated. It wrote:

> The Supreme Court has held that a magistrate may find probable cause only "from the facts or circumstances presented to him under Oath or Affirmation." *Nathanson v. United States*, 290 U.S. 41 at 47, 54 S.Ct. 11, 13, 78 L.Ed. 159 (1933) . . . The nearly unanimous view is that the Fourth Amendment requires that only information related to the magistrate on Oath or Affirmation is competent upon which to base a finding of probable cause . . ."

441 F.2d 1227.

In this case, the Ninth Circuit implied that, in spite of the constitutional requirement of an oath, the government's erro · is only technical because the Petitioner was not prejudiced:

> Though no original signed affidavit was found in the district court files for the motel room warrant, identical affidavits had been sworn to and signed before the same magistrate in support of the four other warrants issued at the same time. It is therefore clear that the magistrate had before him sufficient sworn testimony of the F.B.I. agent to support issuance of the warrant.

Opinion, p. 1.

However, it should be noted that the fundamental/non-fundamental test, correctly applied, takes the approach that, if in fact the Rule 41 violation is of constitutional proportions, suppression is required; that is, if the government's conduct in any way ignores Fourth Amendment protections, then the search and its fruits must be held invalid—*even if the defendant was not prejudiced* by the violation. For instance, in *United States v. Short*, 600 F.2d 585 (6th Cir. 1979), the court held that a search warrant based on information given to a magistrate over the telephone was invalid, because the oath was adminstered later in the telephone proceeding so as to relate back to the testimony already supplied. The court had no quarrel whatever with the sufficiency of the testimony's content. Therefore, it was clear that the defendant was in no way prejudiced; had the government strictly complied with Rule 41, the magistrate would have acted no differently. But the importance of the Oath requirement nevertheless rendered the error fundamental. *See also, United States v. Boyd*, 422 F.2d 791 (6th Cir. 1970), where the government's failure to transfer the date of surveillance from a handwritten draft of the affidavit to the official sworn affidavit rendered the warrant invalid.

Seen in this light, the Ninth Circuit's opinion is an erroneous application of its own test. The opinion ignores that the government's conduct directly implicates the Fourth Amendment. Therefore, whether or not Petitioner was prejudiced is irrelevant. Because of the clear mandate of the Fourth Amendment, a failure to base a search warrant on a sworn statement is a fundamental violation of Rule 41, and the fruits of the search should be suppressed.

B. The Government's Failure to Present the Magistrate With a Sworn Affidavit Violates a Provision of Rule 41 Designed to Assure Reasonableness on the Part of Federal Officers or to Protect the Integrity of Federal Courts

If this case had been decided in a jurisdiction using the reasonableness/blueprint test, an opposite result from the Ninth Circuit's would have obtained. As discussed above, that test examines whether the violated provision of Rule 41 merely blueprints the procedure of issuance of federal warrants, or rather, assures reasonableness on the part of federal officers or protects the integrity of federal courts. Applying this test in the instant case, the court would have to determine the function or the purpose of Rule 41's oath requirement.

Rule 41 contains a requirement for a sworn statement in order to impress upon an agent seeking a warrant the seriousness of the search and seizure process, and the importance of accuracy in that process. In *United States v. Turner*, 558 F.2d 46 (2d Cir. 1976), the court upheld the validity of an oath administered over the telephone, because an oath. whether in court or over the telephone, serves the same function. The court described that function as follows:

> An "Oath or Affirmation" is a formal assertion of, or attestation to, the truth of what has been, or is to be, said. It is designed to ensure that the truth will be told by ensuring that the witness or affiant will be impressed with the solemnity and importance of his words. The theory is that those who have been impressed with moral, legal, or religious significance of formally undertaking to tell the truth are more likely to do so

> than those who have not made such an undertaking or been so impressed.

558 F.2d at 50.

Likewise the Advisory Committee Note to the 1977 amendment to Rule 41(c) stated:

> The significance of the oath requirement is "that someone must take responsibility for the facts alleged, giving rise to the probable cause for the issuance of a warrant." *United States ex rel. Pugh v. Pate*, 401 F.2d 6 (7th Cir. 1968); See also *Frazier v. Roberts*, 441 F.2d 1224 (8th Cir. 1971).

8A Moore's Federal Practice, 2d ed., 1981, p. 41-19.

Clearly, the function of the Rule 41 requirement that there be a sworn statement before the issuance of a federal search warrant is a substantive one—it is a safeguard against haphazard and unconstitutional searches and seizures. Rather than being merely a procedural "blueprint for the issuance of federal warrants", the requirement serves to assure reasonableness on the part of federal officers and protects the integrity of the federal court. Therefore, under the test used by the Second and Eighth Circuits, a transgression of Rule 41's oath requirement imposes a duty on a trial court to suppress the fruits of the search.

CONCLUSION

Because of the two different standards used to determine whether suppression is appropriate when a search has violated some aspect of Rule 41, the same circumstances could render dissimilar results depending on which test was applied. Therefore, Petitioner respectfully submits that a

Writ of Certiorari be issued to review this conflict and to decide which standard is the correct one. If this Court should decide that the Ninth Circuit used the correct test in this case, Petitioner asks that a Writ of Certiorari be issued to review the Ninth Circuit's holding that the government's failure to submit a sworn affidavit to the federal magistrate was an error only technical in nature and of no constitutional significance. If this Court should decide that the Ninth Circuit used the wrong test, Petitioner asks that a Writ of Certiorari be issued to review the applicability of the correct test to the facts of this case.

DATED: December 7, 1981

Respectfully submitted,

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Appendix A

United States Court of Appeals
For the Ninth Circuit
Case No. 80-1764
DC No. 80-668-1-DWW
United States of America,
Plaintiff-Appellee,

vs.

William Morter,
Defendant-Appellant.

MEMORANDUM
In the United States District Court
for the Central District of California

David W. Williams, District Judge, Presiding

Argued and submitted: *October 6, 1981*

Before: SNEED, KENNEDY, and SKOPIL,
Circuit Judges

Morter appeals from his conviction for possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). We affirm.

The trial court did not err in denying appellant's motion to suppress. Only fundamental violations of Fed.R.Crim.P. 41 require suppression of evidence obtained under the warrant. *United States v. Vasser*, 648 F.2d 507, 510 (9th Cir. 1980). The violation here was only technical. Though no original signed affidavit was found in the district court file for the motel room warrant, identical affidavits had been

sworn to and signed before the same magistrate in support of the four other warrants issued at the same time. It is therefore clear that the magistrate had before him sufficient sworn testimony of the FBI agent to support issuance of the warrant.

It was not error for the trial court to refuse appellant's theory of the case jury instruction, because the charge as a whole adequately covered the theory of the defense. *Charron v. United States*, 412 F.2d 657, 660 (9th Cir. 1969).

The trial court's response to the question from the jury during deliberations was not error. The court's response was an accurate factual summary of the evidence. Because there had been no evidence adduced during trial that anyone other than Morter had been seen driving the Mercury at any time, it did not distort the evidence. Further, the trial court has the right to comment upon the evidence in the case, and may draw the jury's attention to parts of the evidence it thinks important. *Quercia v. United States*, 289 U.S. 466, 469 (1933).

AFFIRMED.